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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|----------------------|---|-----------------------|
| RICKY COLE, |) | |
| |) | |
| Appellant-Defendant, |) | |
| |) | |
| vs. |) | No. 49A04-0604-CR-194 |
| |) | |
| STATE OF INDIANA, |) | |
| |) | |
| Appellee-Plaintiff. |) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard Sallee, Judge
Cause No. 49F10-0508-CM-134526

March 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a bench trial, Ricky Cole appeals his conviction for resisting law enforcement, a Class A misdemeanor.¹ On appeal, Cole raises two issues, which we restate as follows: whether Cole's counsel was ineffective for not filing a motion to suppress or for not withdrawing based on an alleged conflict of interest; and whether the evidence presented is sufficient to support Cole's conviction for resisting law enforcement. Concluding that Cole did not receive ineffective assistance of counsel, and that the evidence presented was sufficient to support his conviction, we affirm.

Facts and Procedural History

On August 4, 2005, several police officers, including Officers Riggs and Campbell, attempted to execute a search warrant at a house in Indianapolis where an occupant was suspected of dealing drugs. The officers wore black tactical vests with the word "Police" printed on the front and back. As the officers approached the door, several people began to run from the back of the house. The officers pursued them.

Among those running from the scene were Cole and his cousin, co-defendant Frederick Johnson. Cole and Johnson deny having been inside the house. They each testified that they were behind the house in an alley when they saw people running. They admit that they ran when they saw the others running, but stated that they did not know the others were running from police officers.

Officer Campbell testified that he pursued Cole from the house while Officer Riggs

pursued Johnson.² Officer Campbell stated that Cole looked back at him several times and was aware that he was a police officer. He also stated that he was certain that Cole heard his command to stop running, but continued to flee until marked patrol cars appeared in the area. According to Officer Campbell, Cole willingly stopped running and walked back to him once he saw the patrol cars. At this point, Officer Campbell placed Cole in handcuffs and arrested him.

Cole told a different version of events at trial. He testified that he ran until a security officer at a nearby health services clinic stopped him and asked him what was wrong. He told the security officer that people were running from a nearby house and the security officer contacted the police. The security officer then took him back to the police officers at the house. Cole stated that he neither saw nor ran from Officer Campbell.

Cole was convicted on March 13, 2006, for resisting law enforcement. Johnson was convicted of resisting law enforcement and battery. Cole now appeals.

Discussion and Decision

I. Ineffective Assistance of Counsel

A. Standard of Review

A defendant claiming ineffective assistance of counsel must show that his counsel was deficient in performance and that the deficiency resulted in prejudice. Reed v. State, 856

¹ Cole was also charged by information with possession of marijuana under thirty grams, a Class A misdemeanor. The record is unclear as to when or why this charge was dropped.

² Officer Riggs testified that he pursued Johnson from the house and eventually was able to detain him. He testified that Johnson punched him during the arrest. Johnson testified, though, that he ran a few blocks and an officer stopped him and asked him which way people were running. He pointed out the

N.E.2d 1189, 1195 (Ind. 2006).

To satisfy the first prong, the petitioner must show that counsel's performance was deficient in that counsel's representation fell below an objective standard of reasonableness and that counsel committed errors so serious that petitioner did not have the "counsel" guaranteed by the Sixth Amendment. To show prejudice, the petitioner must show a reasonable probability that but for counsel's errors the result of the proceeding would have been different.

Id.

Cole argues that his counsel was ineffective for two reasons: (1) for failing to move to suppress his arrest; and (2) for failing to withdraw based on a conflict of interest.

B. Cole's Representation

1. The Motion to Suppress

In order to show that his counsel was ineffective because he failed to file a legitimate motion to suppress, Cole must show that Counsel's decision not to file the motion was not a matter of trial strategy, and that had the motion been filed, there is a reasonable probability that it would have been granted. See Glotzbach v. State, 783 N.E.2d 1221, 1224-25 (Ind. Ct. App. 2003). We first consider whether a motion to suppress would have a reasonable probability of being granted in this case.

A person who flees from a police officer after the officer has identified himself and ordered the person to stop commits a Class A misdemeanor. Ind. Code § 35-44-3-3(a)(3). An officer may arrest a person if he has probable cause to believe that the person is committing a misdemeanor in the officer's presence. Ind. Code § 35-33-1-1(a)(4). Whether a police officer lawfully ordered a defendant to stop is irrelevant to the defendant's guilt of

direction where one person ran and the officer left. He then kept running until he saw Officer Riggs, who

resisting law enforcement under Indiana Code section 35-44-3-3(a)(3). Lashley v. State, 745 N.E.2d 254, 261 (Ind. Ct. App. 2001), trans. denied (recognizing that the statute “does not condition the offense upon a lawful order”) (quoting Corbin v. State, 568 N.E.2d 1064, 1065 (Ind. Ct. App. 1991)).³

When Cole ran from Officer Campbell after Officer Campbell identified himself and asked Cole to stop, Officer Campbell had probable cause to believe Cole was committing the misdemeanor of resisting law enforcement, thereby justifying Officer Campbell’s arrest of Cole. Because Officer Campbell had probable cause to arrest Cole, there is not a reasonable probability that a motion to suppress would have been granted. Therefore, Cole was not prejudiced by the fact that his counsel did not make this motion.⁴

2. Withdrawal Based on Conflict of Interest

The constitutional right to effective assistance of counsel “necessarily includes representation that is free from conflicts of interest.” Edwards v. State, 807 N.E.2d 742, 745 (Ind. Ct. App. 2004). Joint representation without impaired performance is not a per se violation of the constitutional guarantee of effective assistance of counsel. Id. “In order to

pointed a gun at him. At that time, he stopped running and allowed himself to be handcuffed.

³ We note, however, that officers may make a brief investigative stop of a suspect if they have reasonable suspicion that the person is involved in criminal activity. Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003). Flight from a police officer is a factor in determining whether reasonable suspicion exists, as is presence in a high-crime area. State v. Belcher, 725 N.E.2d 92, 95 (Ind. Ct. App. 2000), trans. denied. Here, the fact that Cole fled from police officers coupled with his presence in or behind the house the officers were about to search was enough to give rise to the reasonable suspicion necessary to detain him.

⁴ Because we conclude that a motion to suppress would not have been granted, we do not address whether Counsel’s decision not to file the motion was a matter of legitimate trial strategy. We note that trial counsel should be given considerable discretion in choosing strategy and that we consider these strategy decisions with deference. Thomas v. State, 797 N.E.2d 752, 757 (Ind. 2003).

establish a violation of the Sixth Amendment due to a conflict, a defendant who failed to raise the objection at trial must demonstrate: (1) that trial counsel had an actual conflict of interest; and (2) that the conflict adversely affected counsel's performance." Id. Once these two prongs are met, prejudice is presumed. Id.

"Conflict of interest occurs whenever one defendant stands to gain significantly by counsel advancing plausible arguments that are damaging to a co-defendant whom counsel also is representing." Williams v. State, 529 N.E.2d 1313, 1315 (Ind. Ct. App. 1988). Cole argues that a conflict of interest occurred when his counsel represented Johnson as a co-defendant. Cole argues that his counsel may not have filed a motion to suppress because "arguing suppression may have caused a division in the attorney's time that he was not willing to take" or because "suppression of evidence against Cole may have agitated [counsel's] relationship with Johnson." Appellant's Brief at 10. Cole has presented no evidence in support of either argument. Further, we fail to see, and Cole has not explained, how suppression of evidence against Cole would have adversely affected Johnson.

Cole also argues that his counsel's performance was affected because Cole was less culpable than Johnson. He argues that his counsel could not have contrasted his behavior in walking back to the police officer who was chasing him with Johnson's aggressive behavior, because this would have adversely affected Johnson. Although in some cases the varying culpability of co-defendants can make dual representation problematic, these situations primarily relate to crimes committed jointly by the defendants, Edwards, 807 N.E.2d at 746, or in situations where counsel could have argued that one client's lesser culpability merited a

lesser crime or sentence. Williams, 529 N.E.2d at 1315-16. None of these concerns are present here, since Cole and Johnson committed their crimes separately and the guilt of one defendant would have no effect on the guilt of the other. Cole has not presented any reason that any lesser culpability on his part caused a conflict of interest.

Finally, Cole argues that, because of a conflict of interest, his counsel could not question Johnson about whether Johnson implicated Cole when he pointed out to an officer the direction in which one of the suspects fled. Cole has not explained why he would have wanted to question this behavior of Johnson's or how it would have helped his case. Also, Cole failed to articulate how joint representation caused counsel not to address this issue.

Cole cannot show that his counsel's representation of Johnson impaired his performance. No evidence was presented that a conflict of interest caused Cole's counsel to not file a motion to suppress on behalf of Cole. Instead, as discussed above, Cole's counsel likely did not file this motion because it did not have a reasonable probability of success. His counsel did not advance any arguments in Johnson's favor that were damaging to Cole. Counsel had good reason not to point out to the court that Cole walked back to the police while Johnson did not, because this version of events was described through Officer Campbell's testimony, not Cole's. Cole testified that a security guard took him back to the officers at the house and that he neither saw nor ran from Officer Campbell. It would have damaged Cole's credibility for his counsel to raise this point. There was also no evidence presented at trial that Johnson implicated Cole. Johnson simply testified that he told a passing officer, "one ran that way, he went that way." Transcript at 21. Further, Cole has

not explained how evidence that Johnson implicated him would have helped his defense. We conclude that Cole did not receive ineffective assistance of counsel.

II. Sufficiency of the Evidence

When we review a claim of insufficient evidence, we will neither reweigh the evidence nor judge the credibility of the witnesses. Brown v. State, 830 N.E.2d 956, 967-68 (Ind. Ct. App. 2005). We will instead look to the evidence most favorable to the judgment and the reasonable inferences therefrom. Id. at 968. If there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt, we will affirm. Id.

A person resists arrest when he knowingly or intentionally flees from a police officer after the officer has identified himself and has ordered the suspect to stop. Ind. Code § 35-44-3-3(a)(3). According to Officer Campbell's testimony, he identified himself as an officer and asked Cole to stop. He stated that Cole looked back at him and heard him, but continued to run. We will not judge Officer Campbell's credibility, nor reweigh the evidence presented. Although Cole testified that a different set of events occurred, a reviewing court does not resolve conflicts in the evidence. Appleton v. State, 740 N.E.2d 122, 128 (Ind. 2001). Officer Campbell's testimony constitutes sufficient evidence to confirm Cole's conviction.

Conclusion

We conclude that Cole did not receive ineffective assistance of counsel when his

counsel did not file a motion to suppress and did not withdraw based on an alleged conflict of interest. We further conclude that the evidence presented at trial was sufficient for the trial court to find Cole guilty.

Affirmed.

BAKER, C.J. and DARDEN, J., concur.